Supreme Court, U.S.
FILED
APR 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1518 (2)

VOLKSWAGEN OF AMERICA, a corporation
and
VOLKSWAGENWERK A.G., a corporation,
Petitioners,

vs.

PHYLLIS A. ROSSELL, guardian ad litem
of **JULIE ANN KENNON,** a minor,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Phyllis A. Rossell, guardian ad litem of Julie Ann Kennon, a minor, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Arizona Supreme Court's opinion in this case. That opinion is reported at 709 P.2d 517, ___ Ariz. ___ (1985).

REASONS WHY THE PETITION SHOULD BE DENIED

The questions presented by the Petition for Certiorari are:

1. Whether this Court has jurisdiction to consider a petition for certiorari based on an alleged federal question raised for the first time on a motion for reconsideration filed in the state supreme court.

2. Whether the Equal Protection Clause requires that a state treat manufacturers in negligence cases as "professionals," rather than as ordinary citizens.

3. Whether the Due Process Clause prohibits a state court from exercising its appellate jurisdiction in order to review issues not previously decided by a lower appellate court.

The Equal Protection argument raised in the Petition for Certiorari was raised for the first time in a motion for reconsideration filed in the Arizona Supreme Court. *See* Defendants' Motion for Reconsideration, a copy of which is attached as Appendix G to the Petition for Writ of Certiorari. Raising a federal question for the first time in a motion for rehearing addressed to the highest state court is generally insufficient unless the Court actually entertains the petition and expressly decides the question. Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) at p. 155, *citing Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935). Here, the Equal Protection issue was not raised at any time prior to the motion for reconsideration. Moreover, the motion for reconsideration was not entertained, but was summarily denied.

The distinction between professional and non-professional defendants in negligence cases is nothing "newly created" by the Arizona Supreme Court. The distinction is well known in every jurisdiction in America. It is recognized by such authorities as Prosser in his treatise on torts and is taught to every first year law school student throughout the country. The Arizona Supreme Court's holding was not arbitrary and capricious, as Petitioners suggest; rather, the court followed a long tradition in holding that manufacturers are to be treated just as any other defendant in a negligence case. Nowhere does the Constitution indicate that manufacturers are entitled to any special preference not allowed to other defendants in negligence cases. Accordingly, no federal question is involved and Petitioners' request should be denied.

Petitioners' second complaint is that the Arizona Supreme Court violated the Due Process Clause of the Constitution by reviewing issues not decided by the court of appeals. Petitioners' assertion that the court's action was contrary to Arizona law is without merit. The Arizona Constitution grants the Arizona Supreme Court jurisdiction to decide all issues necessary to resolve any appeal. Ariz. Const. Art. VI, § 5(3); *see also Hancock v. State*, 254 P.2d 225, 31 Ariz. 389 (1927) (appellate court which accepts review takes jurisdiction of the case for all purposes). Moreover, it is manifest that the only manner in which the Petitioners could have been prejudiced by the supreme court's accepting jurisdiction on these issues would be the speculative hope that the court of appeals on remand would issue an erroneous decision (i.e., contrary to that already rendered by the supreme court) and that the Arizona Supreme Court in its discretionary review power would decline to accept review to correct this error. Our Federal Constitution does not include the right to such erroneous rulings.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny Petitioners' Petition for a Writ of Certiorari and, additionally, that the Court grant Respondent her costs in opposing the Petition, as well as imposing sanctions pursuant to U.S. Supreme Court Rule 49.2, 28 U.S.C.A.

RESPECTFULLY SUBMITTED this 16th day of April, 1986.

LANGERMAN, BEGAM,
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CERTIFICATE OF MAILING

The original and forty (40) copies of the foregoing Brief in Opposition to Petition for Certiorari were delivered this 16th day of April, 1986, to the Supreme Court of the United States and two (2) copies each were delivered to:

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APPENDIX A

Arizona Constitution Article VI, § 5(3):

"The Supreme Court shall have:

* * *

"Appellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax, impost, assessment, toll, statute or municipal ordinance."